



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 25

[Docket No. FWS-HQ-NWRS-2022-0092; FXRS12610900000-212-FF09R20000]

RIN 1018–BG80

National Wildlife Refuge System; Drain Tile Setbacks

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose new regulations pertaining to wetland easements to bring consistency, transparency, and clarity for both easement landowners and the Service in the administration of conservation easements, pursuant to the National Wildlife Refuge Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997. The proposed regulations would codify the process by which the Service establishes drain tile setbacks in wetland easement contracts. Setback distances would be calculated based upon the best available science considering soil characteristics, tile diameter, the depth of the tile below the surface, and/or topography sufficient to the easement contract's standard of protection that ensures no drainage of adjacent protected wetland areas. The proposed regulations would apply only to setbacks provided by the Service beginning on the effective date of the final rule.

DATES: *Written comments:* We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Information collection requirements: If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained

in this proposed rule between 30 and 60 days after publication of this proposed rule in the *Federal Register*. Therefore, comments should be submitted to OMB by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: *Written comments:* You may submit comments by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>.

In the Search box, type in FWS-HQ-NWRS-2022-0092, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting screen, find the correct document and submit a comment by clicking on “Comment.”

- *By hard copy:* Submit by U.S. mail or hand delivery: Public Comments Processing, Attn: FWS-HQ-NWRS-2022-0092; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: PRB (JAO/3W); Falls Church, VA 22041–3803.

We will not accept e-mail or faxes. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Request for Comments**, below, for more information).

Information collection requirements: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review – Open for Public Comments” or by using the search function. Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803 (mail); or Info_Coll@fws.gov (email). Please reference “OMB Control Number 1018–New Drain Tile Setbacks” in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Debbie DeVore, (251) 604–1383. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside

the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Wetland habitat in the Prairie Pothole Region (PPR) of Iowa, Minnesota, Montana, North Dakota, and South Dakota is critically important to waterfowl and other migratory bird populations. The unique topography of the PPR includes the numerous small wetlands and potholes typical of the PPR that were formed through glaciation thousands of years ago. Prairie potholes are freshwater depressions and marshes, often less than 2 feet deep and 1 acre in size, that are a permanent feature of these landscapes barring deliberate alteration of the topography or hydrology. What makes the PPR so biologically important to waterfowl is the seasonal fluctuation of surface water through these permanent wetlands basins. The PPR is responsible for producing approximately 50 to 75 percent of the primary species of ducks on the North American continent, providing habitat for more than 60 percent of the breeding population. Waterfowl fledged in the PPR are a significant natural resource that supports waterfowl hunting and an associated industry that creates an estimated 30,000 jobs and nearly \$1 billion in economic benefit.

Congress, recognizing the impact that widespread drainage was having on wetlands and waterfowl populations in the PPR, officially created the Small Wetlands Acquisition Program on August 1, 1958, by amending the 1934 Migratory Bird Hunting Stamp Act (commonly referred to as the “Duck Stamp Act”). The amendment allowed proceeds from the sale of Federal Duck Stamps to be used to conserve and protect “small wetland and pothole areas” through the acquisition and establishment of areas designated as Waterfowl Production Areas (WPAs). The Service purchased the first fee-title WPA in South Dakota in 1959 and began to purchase wetland easements soon thereafter. The acquisition of wetland easements accelerated across the PPR following the passage of the 1961 Wetlands Loan Act (Public Law 87–383), which

authorized appropriations to advance funding for the purchase of wetland easements. Wetland easements are part of the National Wildlife Refuge System, governed by the National Wildlife Refuge System Administration Act (hereafter, “the Administration Act”; 16 U.S.C. 668dd, et seq.).

Wetland Easements

This proposed rulemaking action would create new regulations pertaining to easement lands protected by a Service easement for waterfowl management rights (commonly referred to as a “wetland easement”) in the PPR. The easements are areas of land or water acquired and administered by the Service with a less than fee interest for the purpose of maintaining small wetland or pothole areas suitable for use as WPAs.

A wetland easement is a voluntary legal agreement with the Service that pays landowners to permanently protect wetlands. The easement contains restrictions on the use or development of the land to protect its conservation values. The Service’s wetland easements are minimally restrictive conservation easements, meaning that they have a minimal impact on the property value and limit the landowner’s use and enjoyment of the property to a minor degree. Landowners who sell a wetland easement to the Service agree that wetlands protected by an easement cannot be drained, filled, leveled, or burned. If these wetlands dry up naturally, they can be farmed, grazed, or hayed.

Drain Tiles

Traditionally, the purpose of subsurface agricultural drainage has been to lower the water table of poorly drained soils with the goal of improving soil aeration. Recently, advanced drainage systems have been promoted as a way to manipulate soil water content during the growing season. Subsurface drainage systems typically remove water through perforated pipe (commonly referred to as drain tile) placed below the soil surface.

Drain tile positioned adjacent to wetland areas can result in reduced hydroperiods (periods of inundation) depending on several factors, such as the depth of tile in relation to the

wetland area. The amount and timing of precipitation intercepted by subsurface drainage systems will vary depending on soil properties, topography (low/high topographic relief), placement of tile relative to the wetland area (horizontal distance, elevation), and the relation between the wetland area and groundwater (i.e., recharge, discharge). Direct drainage of a wetland area by placing perforated tile and surface inlet pipes through (beneath) the wetland area would have a detrimental effect on wetland hydrology regardless of other factors.

Drainage systems positioned adjacent to a wetland area in low-relief terrain have the potential to indirectly affect the wetland area through lateral drainage (lateral effect). The lateral effect is defined as the perpendicular distance on either side of a tile pipe where soil water can be drained by the tile. Drainage systems positioned to encircle a wetland area completely or partially in high-relief terrain can intercept groundwater and precipitation runoff to the wetland area depending on the previously mentioned factors.

This Proposed Rule

The proposed regulations in this document clarify that drain tile may be installed on lands encumbered by a wetland easement provided that protected wetland areas are not drained, directly or indirectly. This proposed rule distinguishes Service wetland easements from the “Swampbuster” provisions of the Food Security Act of 1985 (also known as the “Farm Bill”; Pub. L. 99–198), which allow drain tile to have a “minimal effect” to wetlands. Service wetland easement agreements with landowners include provisions that allow for no effect; hence, the proposed regulations would clarify that tile may be installed on a wetland easement tract provided that the tile does not drain a protected wetland area.

Because the impact of a given drainage system on wetland areas varies greatly depending on site conditions, the Service will provide individual drain tile setback distances to landowners. The proposed regulations would require the Service to establish drain tile setback distances based upon the best available science, considering soil characteristics, tile diameter, the depth of

the tile below the surface, and/or topography that ensure protected wetland areas are not drained. Furthermore, the Service will provide these setback distances to landowners upon request.

Additionally, we propose that landowners who adhere to the setback distances prescribed by the Service, including the tile diameters and tile depths below the surface that were used to calculate the Service-provided drain tile setback distances, will not be required to remove drain tile that is later found to have an adverse effect on protected wetland areas. These proposed regulations recognize that our understanding of the effects that drain tile may have on wetland hydrology is an evolving science. Service-provided drain tile setback distances may prove inadequate to fully protect easement wetland areas from drainage. However, landowners who coordinate their tiling plans with the Service and adhere to the Service-determined setback distances would not later be held criminally responsible or civilly liable for disturbing, injuring, or destroying a unit of the National Wildlife Refuge System (i.e., draining a protected wetland area) provided the subsurface drainage system is not modified, enhanced, or replaced.

Proposed Amendments to Existing Regulations

This document proposes to codify in the Code of Federal Regulations the following provisions:

(1) Within a Service-provided timeframe, the Service will provide setback distances for the placement of drain tile on lands covered by wetland easements in Iowa, Minnesota, Montana, North Dakota, and South Dakota;

(2) the Service will provide guidance to landowners about what materials should be submitted as part of a request; and

(3) when a landowner coordinates tile planning with the Service in accordance with this guidance and adheres to the Service-provided drain tile setback distances, including the tile diameters and tile depths below the surface that were used to calculate the Service-provided drain tile setback distances, the Service will not seek legal redress if it is later determined that the

Service-provided drain tile setback distances failed to protect the wetland areas from drainage, provided that the drain tile has not been modified, enhanced, or replaced.

The regulations would apply only to setbacks provided by the Service beginning on the effective date of the final rule.

Statutory Authority

The Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997 (hereafter, “the Improvement Act”; Pub. L. 105–57), governs the administration and public use of refuges.

Amendments enacted by the Improvement Act were built upon the Administration Act in a manner that provides an “organic act” for the Refuge System, similar to organic acts that exist for other public Federal lands. The Improvement Act serves to ensure that we effectively manage the Refuge System as a national network of lands, waters, and interests for the protection and conservation of our Nation’s wildlife resources. The Administration Act states first and foremost that we focus our Refuge System mission on the conservation of fish, wildlife, and plant resources and their habitats. The Act contains 14 directives to the Secretary, one of which states that, in administering the Refuge System, the Secretary shall ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges. The Administration Act also authorizes the Secretary to issue regulations to carry out the purposes of the Act.

Request for Comments

You may submit comments and materials on this proposed rule by any one of the methods listed in **ADDRESSES**. We will not accept comments sent by e-mail or fax or to an address not listed in **ADDRESSES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post your entire comment on <https://www.regulations.gov>. Before including personal identifying information in your comment, you should be aware that we may make your entire comment—including your personal identifying information—publicly available at any

time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <https://www.regulations.gov>.

Required Determinations

Clarity of This Proposed Rule

Executive Orders 12866 and 12988 and the Presidential Memorandum of June 1, 1998, require us to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this rulemaking is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant,

feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996)), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities. However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b).

Within the Prairie Pothole Region (comprising Iowa, Minnesota, North Dakota, South Dakota, and Montana), there are approximately 28,000 wetland easements, of which the majority are located on privately owned farmland. Thus, small businesses within the crop production industry (North American Industry Classification System 111) may be impacted by the proposed rule. One aspect of the proposed rule codifies the Service’s existing drain tile setback practices; therefore, the effect of this regulatory provision on small businesses would be negligible. The proposed rule also provides legal certainty for landowners who adhere to the setback distances prescribed by the Service. The information collection form to request the setback distances is estimated to take 15 minutes, which would be negligible for small businesses. Currently, approximately 20 landowners annually (less than 0.01 percent) must remove drain tile systems

because they do not adhere to the contract that granted the easement. As a result of the added benefit of legal certainty, the proposed rule may provide the incentive to these landowners to adhere to the contract and, thus, reduce the costs of removing drain tile systems. The average annual number of small businesses (20) potentially impacted by this rulemaking is not substantial.

Therefore, we certify that this rule, as proposed, would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). An initial regulatory flexibility analysis is not required. Accordingly, a small entity compliance guide is not required.

Congressional Review Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Congressional Review Act. We anticipate no significant employment or small business effects. This proposed rule:

a. Would not have an annual effect on the economy of \$100 million or more. The minimal impact would be scattered across five States and would most likely not be significant in any local area.

b. Would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This proposed rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The proposed rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

Takings (E.O. 12630)

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. A takings implication assessment is not required. The proposed rule does not have any takings implications because it would not impact protected property rights. The proposed rule provides clarity and standardization of the Service's existing process for providing drain tile setback distances to landowners and provides landowners with legal protection when they choose to follow the Service's setback distances. The proposed rule would not require landowners to consult the Service regarding setback distances, nor would it require landowners to follow the Service's setback distances if they are provided.

Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Department of the Interior has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Energy Supply, Distribution or Use (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A statement of energy effects is not required.

Consultation and Coordination with Indian Tribal Governments (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this proposed rule under Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian Tribes.

Paperwork Reduction Act (PRA)

This proposed rule contains new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The new reporting and/or recordkeeping requirement associated with requests for drain tile setbacks described below requires approval by OMB:

Requests for Drain Tile Setbacks (FWS Form 3–2554)

Upon the request of a landowner (via submission of FWS Form 3–2554), the Service will provide setback distances for the placement of drain tile on lands covered by wetland easements. The setback distances will be based on best available science and must be adequate to ensure protected wetland areas are not drained. Information collected via FWS Form 3–2554 includes basic contact information for the landowner, along with the easement number(s) for the specific land covered by the wetland easement.

The Service will provide guidance to landowners about what materials should be submitted as part of a request and will provide setback distances to landowners within a Service-provided timeframe. When a landowner coordinates their tile planning with the Service in accordance with this guidance and adheres to the Service-provided drain tile setback distances, the Service will not seek legal redress if it is later determined that Service-provided drain tile setback distance failed to protect the wetland areas from drainage, provided that drain tile has not been modified, enhanced, or replaced.

Title of Collection: Requests for Drain Tile Setback (50 CFR part 25).

OMB Control Number: 1018–NEW.

Form Number: FWS Form 3–2554.

Type of Review: New.

Respondents/Affected Public: Individuals/households, businesses, and State/local/Tribal governments.

Total Estimated Number of Annual Respondents: 150.

Total Estimated Number of Annual Responses: 150.

Estimated Completion Time per Response: 5 minutes for reporting and 10 minutes for recordkeeping requirements.

Total Estimated Number of Annual Burden Hours: 39.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Send your written comments and suggestions on this information collection by the date indicated in **DATES** to OMB, with a copy to the Service Information Collection Clearance

Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: PRB (JAO/3W), Falls Church, VA 22041–3803 (mail); or Info_Coll@fws.gov (email). Please reference “OMB Control Number 1018–New Drain Tile Setbacks” in the subject line of your comments.

National Environmental Policy Act

We are required under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) to assess the impact of any Federal action significantly affecting the quality of the human environment, health, and safety. We have determined that the proposed rule falls under the class of actions covered by the following Department of the Interior categorical exclusion: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” (43 CFR 46.210(i)). The proposed regulations would codify existing Service practice in administering minimally restrictive wetland easements.

Primary Author

Debbie DeVore, Division of Natural Resources and Conservation Planning, National Wildlife Refuge System, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 25

Administrative practice and procedure, Concessions, Reporting and recordkeeping requirements, Safety, Wildlife refuges.

Proposed Regulation Promulgation

For the reasons set forth in the preamble, we propose to amend title 50, chapter I, subchapter C of the Code of Federal Regulations as set forth below:

PART 25—ADMINISTRATIVE PROVISIONS

1. The authority citation for part 25 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, and 715i, 3901 et seq.; and Pub. L. 102-402, 106 Stat. 1961.

Subpart B—Administrative Provisions

2. Revise § 25.23 to read as follows:

§ 25.23 Information collection requirements.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in part 25 and assigned OMB Control Numbers 1018–0102, 1018–0140, 1018–0181, or 1018–#### (unless otherwise indicated). Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Direct comments regarding the burden estimates or any other aspect of the information collection to the Service’s Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

3. Add § 25.24 to read as follows:

§ 25.24 Drain tile setbacks.

(a) *Applicability.* The regulations in this section apply to any easement lands protected by a U.S. Fish and Wildlife Service easement for waterfowl management rights (commonly referred to as a wetland easement) that were acquired through the Small Wetlands Acquisition Program in the Prairie Pothole Region of Iowa, Minnesota, Montana, North Dakota, and South Dakota. The regulations in this section apply only to setbacks provided by the Service beginning on [EFFECTIVE DATE OF THE FINAL RULE].

(b) *Drainage tile setbacks.* Upon the request of a landowner, the Service will provide setback distances for the placement of drain tile on lands covered by wetland easements. The setback distances will be based on the best available science and must be adequate to ensure that protected wetland areas are not drained. Contact your local U.S. Fish and Wildlife Service station to obtain further information. You can obtain contact information for your local Service station by contacting one of the Service regional offices; addresses for these offices are at 50 CFR 2.2.

(c) *Protection from legal redress.* The Service will provide guidance to landowners about what materials should be submitted as part of a request and will provide setback distances to landowners within a Service-provided timeframe. When a landowner coordinates tile planning with the Service in accordance with the regulations in this section and adheres to the Service-provided drain tile setback distances, including the tile diameters and tile depths below the surface that were used to calculate the Service-provided drain tile setback distances, the Service will not seek legal redress if it is later determined that the drain tile setback distances provided by the Service failed to protect the wetland areas from drainage, provided that the drain tile has not been modified, enhanced, or replaced.

Shannon Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

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